Supreme Court, U.S.
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No. 99-27

In the

Supreme Court of the United States

October Term, 1998

GLADYS SHELTON,

Petitioner,

v.

HAROLD L. ROSBOTTOM, JR.,
LESLIE FOX ROSBOTTOM
and MARTIN A. SCHOTT, Chapter 11 Trustee,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I

STATEMENT OF THE CASE

A. Statement of Facts

The Petitioner's Statement of Facts contains a biased, inaccurate account of the events leading up to the Debtor's bankruptcy filing, one filled with innuendo painting Rosbottom as a predator who took advantage of Mrs. Shelton through sharp dealings. This view of the facts is not a correct one and it finds no support in the record of the proceedings below. Respondent Rosbottom will confine his statement of the facts to the version found in the Disclosure Statement for the confirmed plan of reorganization, a document approved by the Bankruptcy Court after notice to Mrs. Shelton and an opportunity for her to voice objections. The sad truth of the matter is that Mrs. Shelton, like most bankruptcy debtors, ended up in Bankruptcy Court through a combination of misfortune and mismanagement.

The corporate Debtor was engaged in the business of operating a truck stop, convenience store and video poker facility in St. Francisville, Louisiana. Mrs. Shelton owned all of the stock of the corporate Debtor and operated the business with the assistance of her son Allen Shelton. In 1993, with Rosbottom's assistance, the Sheltons took advantage of profit opportunities under Louisiana's video poker law, which permitted truck stop facilities to operate mini-casinos of up to 50 video poker machines, while competing bars and restaurants were limited to 3 machines per location. In September of 1994, after the corporate Debtor began realizing profits in excess of $30,000 per month from the video poker facility at St. Francisville, Mrs. Shelton and her son embarked upon a program of expansion, purchasing from Rosbottom an entity know as Louisiana Deridder Truck Stop,

LLC, ("La/Deridder"), which operated another truck stop/video poker facility in Deridder, Louisiana, and leasing from a third party another truck stop/video poker facility at Creole, Louisiana.

Within three months of purchasing La/Deridder from Rosbottom, the corporate Debtor began to experience unexplained cash flow problems, despite huge revenues from the St. Francisville video poker facility. By April of 1995, Mrs. Shelton's son, Allen Shelton, who was primarily responsible for running the La/Deridder and Creole facilities, disappeared and became a fugitive wanted on an arrest warrant. By late May of 1995, Mrs. Shelton had mismanaged the operation of the three truck stop facilities to such an extent that the Creole lease was lost and the La/Deridder facility was threatened with revocation of its video poker license because it was unable for financial reasons to buy fuel and continue operations as a truck stop. Also, no arrangements were made by Mrs. Shelton to re-pave the parking lot at the St. Francisville truck stop to meet specifications of the Louisiana authorities, an action required by December 31, 1995, in order to maintain the video poker license at St. Francisville. For these and other reasons, Rosbottom declared a default under his note and security agreements with the Debtor and stepped in to preserve his collateral, taking over operation of La/Deridder in accordance with agreements between the parties and eventually, in September, 1995, obtaining a writ of sequestration of the St. Francisville facility and appointment as keeper of that facility in foreclosure proceedings filed in a Louisiana state court.

As keeper of the St. Francisville truck stop, Rosbottom signed a contract with an independent third- party contractor and posted funds in escrow well in advance of the

December 31, 1995, deadline in order to meet the Debtor's licensing responsibility to have the St. Francisville parking lot paved in accordance with Louisiana's new regulations. Through no fault of Rosbottom, the contractor commenced work on the job, but failed to complete the work prior to the deadline. Although paving of the lot was the Debtor's responsibility, Rosbottom went so far as to hire and pay a second contractor at the last minute to complete the job. Unfortunately, the work done by this contractor was not up to the standards specified by the Louisiana authorities who downgraded Shelton's 50-machine video poker license at St. Francisville to a 3- machine license.

B. Procedural History

Mrs. Shelton first filed a personal Chapter 11 proceeding in October, 1996, then later filed a corporate Chapter 11 case in early January, 1996. From the start of the bankruptcy proceedings, the corporate Debtor was not in possession of its assets as they were being held by Rosbottom as the keeper appointed by the Louisiana state court. Rosbottom held substantial claims against the Debtor and Mrs. Shelton and was by far the Debtor's largest creditor.

The primary focus of both reorganization cases was Mrs. Shelton's attempt to invalidate Rosbottom's mortgages and security agreements, which covered substantially all of the property of the corporate Debtor's estate. To this end, Mrs. Shelton filed five different adversary proceedings in the corporate case seeking to invalidate mortgages and security agreements or to hold Rosbottom liable for perceived ill treatment of Mrs. Shelton and the corporate Debtor. In May of 1996, after a two-day trial, the Bankruptcy Court granted a motion for involuntary dismissal at the conclusion of Mrs.

Shelton's evidence in the first of these adversary proceedings to be tried, casting serious doubt upon the continued viability of the remaining adversaries and Mrs. Shelton's entire approach to reorganization. Thus at the conclusion of the trial on which the debtor had staked all its hopes of reorganizing, and nearly five months after it had sought the shelter of bankruptcy court, the Debtor found itself with absolutely no reasonably foreseeable prospect of reorganizing. It held no assets, had not proposed a plan of reorganization, and as a result of inept attempts to challenge its pre-bankruptcy dealings with Rosbottom, faced potential procedural bars to further challenges to the Rosbottom claim and security.

On the heels of the Debtor's defeat, the bankruptcy court on its on motion ordered the appointment of a trustee, in lieu of converting the case to a Chapter 7 liquidation, and instructed the trustee to retain counsel to investigate thoroughly the Debtor's claims against Rosbottom. The Court made a concerted effort to protect Mrs. Shelton and provided the Trustee an opportunity to amend the Debtor's complaint against Rosbottom before the court signed the order of involuntary dismissal so that potential claims against Rosbottom might be preserved against a potential plea of res judicata or collateral estoppel. The trustee moved immediately to amend the complaint that the bankruptcy judge had ordered dismissed and submitted a complaint challenging a key pre-bankruptcy transaction with Rosbottom that the Debtor's counsel previously had failed to attack, Rosbottom's September 15, 1994 sale to the Debtor of the La/Deridder truck stop.

At a status conference a few days after the court granted the trustee's motion to file the amended complaint, Rosbottom through counsel represented to the court that he intended to file a plan and disclosure statement that

contemplated a resolution of all issues between the parties. As a result, the bankruptcy court stayed all formal discovery and proceedings in the litigation for 60 days. Well before expiration of that time, on July 23, 1996, Rosbottom filed a proposed plan and accompanying disclosure statement. The trustee objected to the initial disclosure statement, and on September 5, 1996, Rosbottom filed his first amended plan and first amended disclosure statement. This amended plan was ultimately confirmed in the corporate case on October 10, 1996, providing a comprehensive solution to the many thorny issues plaguing the case.

The Plan called for transfer of all of the Debtor's assets to a new entity, St. Francisville Investments, LLC ("SFI"), to be capitalized by Rosbottom with a capital infusion of $250,000 cash and $112,500 in real estate, assumption by SFI of some $1,097,526.51 of secured debt owed by the Debtor and Mrs. Shelton to Rosbottom, assumption of some $521,735.23 of secured debt to a bank and the Small Business Administration for which the Debtor and Mrs. Shelton were both liable, payment in full of some $114,243.18 in priority tax claims by SFI, payment in full by SFI of all administrative expenses of the corporate bankruptcy estate, and payment in full of some $499,295.79 in unsecured claims from the proceeds of video poker operations at the St Francisville truck stop facility, if any. Because the Debtor did not have a current 5- machine truck stop video poker license and there was a substantial risk that video poker would be made illegal in East Feliciana Parish as a result of a local option election to be held on November 5, 1996, Rosbottom's plan gave unsecured creditors the option to cash out their claims at 20% of face value. In return for the concessions made by him in the plan, Rosbottom was to obtain dismissal of all

claims and adversary proceedings asserted against him by the Debtor, Mrs. Shelton or the trustee.

After the bankruptcy court approved Rosbottom's first amended disclosure statement on September 6, 1996, the plan, disclosure statement and ballots for voting on the plan were distributed to creditors and parties in interest. The ballot tally filed by Rosbottom as plan proponent reflected acceptance of the plan by all classes of creditors. Mrs. Shelton voted against and objected to the plan. The Chapter 11 Trustee and his well-qualified counsel concluded that the plan was in the best interest of creditors and supported it at the confirmation hearing, despite maintaining an adversarial stance toward Rosbottom.

Prior to the confirmation hearing, at various points during the course of the bankruptcy proceedings, both the Debtor and Rosbottom filed applications with the Louisiana authorities seeking reinstatement of the Debtor's 50-machine video poker license at the St. Francisville truck stop. Reinstatement of the license was considered critical by all parties in interest because a local option election was scheduled to be held in Louisiana on November 5, 1996, to determine the outcome of video poker gaming in each parish (county) in the state. If gaming were voted out in the parish where the St. Francisville truck stop was located, the Debtor would be permitted to continue video poker operations for several years after the election if it held a valid license on the date of the election, but not otherwise. Prior to confirmation, the parties had been unsuccessful in obtaining a hearing before the Louisiana authorities on the applications for reinstatement of the license. Eventually, a hearing was scheduled for October 11, 1996, the day after the scheduled date for the hearing on confirmation of the Rosbottom plan, and a new

license was issued on that date. Mrs. Shelton states in her petition to this court that Rosbottom knew prior to the confirmation hearing on October 10th that the license would be issued on October 11th. This is simply untrue.

A few days before the scheduled confirmation hearing, in a status conference with the court and opposing counsel, Rosbottom requested that the Court delay the confirmation hearing until after the local option election to be held on November 5th. This would have permitted Rosbottom to resolve the outstanding contingencies with respect to issuance of a new license for the St. Francisville truck stop and the unknown results of the upcoming local option election before proceeding with confirmation of his proposed plan. However, the trustee and the Bankruptcy Judge did not want to delay confirmation for fear that Rosbottom might withdraw his plan should there be an adverse outcome to either the licensing or local option election contingencies. Rosbottom was therefore required by the court to proceed with confirmation despite the risks to his position inherent in the outstanding contingencies.

At the October 10, 1996, hearing on confirmation, the court heard expert testimony in support of the Rosbottom plan from a certified public accountant engaged by Rosbottom. This expert witness valued the debtor under three separate scenarios involving resolution of the contingencies with respect to issuance of a new license for the St. Francisville facility and the potential outcome of the local option election. The court also questioned the trustee's certified public accountant concerning the value of the debtor's assets. The trustee, with bankruptcy court approval, had engaged a certified public accountant to evaluate the Rosbottom plan and prepare for the confirmation hearing. Among the

accountant's tasks were determining the value of the debtor's truck stop in St. Francisville, as well as the value of its interest in La/Deridder. Notably, Mrs. Shelton failed to offer any evidence at the October 10th confirmation hearing from a valuation expert, or otherwise, in support of her objection to confirmation.

After hearing the evidence tendered at the confirmation hearing on October 10, 1996, the Court found, based upon the uncontested valuation evidence, that there was no equity in the Debtor for Mrs. Shelton under any possible licensing scenario and confirmed Rosbottom's pan. On October 18, 1996, Rosbottom infused $250,000 into SFI as required under the Plan. A motion to reconsider was filed by Mrs. Shelton on October 21, 1996, and denied by the court on October 25, 1996. The motion was filed by Mrs. Shelton after she learned that the St. Francisville video poker license had been issued, but prior to the November 5th local option election.

The delays for appealing the confirmation order expired on November 4, 1996, and the Trustee transferred all of the Debtor's property to SFI on that date, prior to the local option election to be held on November 5, 1996, so that the plan would be substantially consummated and Rosbottom would have no opportunity to reconsider consummation of the plan in the event of an adverse election result. Significantly, SFI assumed on that date some $521,735,23 of secured debt owed to the Bank of St. Francisville and the Small Business Administration. The articles of organization of La/Deridder were also amended on that date to reflect the substitution of SFI for the Debtor as a member in that limited liability company and the amended articles were filed with the Louisiana Secretary of State.

On the same day, Mrs. Shelton filed her notice of appeal of the confirmation order. Although she knew that the Plan called for transfer of the Debtor's assets to SFI within 10 days of the confirmation order and she had some 25 days between October 10, 1996, and November 4, 1996, within which to seek an order staying consummation of the Plan pending appeal, Mrs. Shelton did not seek a stay order from either the bankruptcy court or the district court. In her petition to this court, Mrs. Shelton states that bankruptcy judge preemptively stated that he would not stay the confirmation order pending appeal. Nevertheless, the fact remains that Mrs. Shelton never formally requested that he do so. Mrs. Shelton also states that she had no opportunity prior to consummation to seek a stay in the district court. This is simply not true. She had a more than ample opportunity to do so between October 10, 1996, and November 4, 1996, and simply failed to avail herself of the opportunity.

On November 6, 1996, SFI paid some $62,176.81 of interest due upon the secured debt of the Small Business Administration and some $13,281.09 of interest due on the secured debt of the Bank of St. Francisville. Rosbottom also tendered a payment of $10,000 due under the plan on the secured debt of Mrs. Shelton's sister, Eula Spillman. Rosbottom further tendered payments totalling $1239.64 to some 14 holders of small unsecured claims against the Debtor.

On November 8, 1996, the Bankruptcy Court dismissed all five pending adversary proceedings against Rosbottom with prejudice, forever putting to rest the claims which are central to Mrs. Shelton's argument that she somehow has equity in the Debtor corporation. On November 13, 1996, as required by local bankruptcy court rules, Rosbottom filed a Motion For Entry of Final Decree and attached his

Final Accounting. An Order for final decree closing the bankruptcy case was entered on December 20, 1996.

On January 2, 1997, SFI paid the finally allowed administrative expense claim of the Chapter 11 trustee in the amount of $13,514.66 and of counsel for the trustee in the amount of $49,057.32. Monthly payments to Class 9(b) unsecured creditors from video poker revenues commenced on April 1, 1997.

On appeal to the district court, Rosbottom moved to dismiss Mrs. Shelton's appeal, arguing that substantial consummation of the plan had rendered the appeal moot and that Mrs. Shelton lacked standing due to conversion of her individual Chapter 11 case to Chapter 7 and appointment of a trustee in that case. Mrs. Shelton did not oppose the motion. The district court accepted Rosbottom's arguments and granted the motion to dismiss. Mrs. Shelton then moved for reconsideration, requesting additional time to secure her Chapter 7 trustee's abandonment of the claims at issue so that she could pursue them. In her motion, Mrs. Shelton did not contest the court's conclusion that her appeal was moot. The district court denied the motion for reconsideration, finding that Mrs. Shelton had failed to show good cause or substantial reason to set aside the dismissal. In its order, the district court noted that it had previously granted Mrs. Shelton an extension and that she had allowed that time to lapse without moving for a continuance or taking other steps to preserve her claims.

Mrs. Shelton then filed a notice of appeal to the Fifth Circuit Court of Appeals from the district court's dismissal of her appeal and its denial of her motion for reconsideration. In the Fifth Circuit, Rosbottom again filed a motion to

dismiss on grounds of mootness and standing. However, the court deferred ruling on the motion and requested that the parties brief the appeal on its merits. Contrary to statements made in Mrs. Shelton's petition to this court, the Fifth Circuit did review and consider the case on the merits, including all of Mrs. Shelton's objections to what she describes in this court as a "patently illegal plan." Only after reviewing the case on the merits did the Fifth Circuit grant Rosbottom's motion to dismiss on mootness grounds.

ARGUMENT

This brief in opposition to Mrs. Shelton's petition for certiorari is filed by Rosbottom pursuant to Rule 15 (2) in order to point out perceived misstatements of fact contained in the petition. Irrespective of this Court's views concerning the wisdom of the equitable mootness doctrine developed by the circuit courts of appeal, the facts and procedural history of this case do not make it a good one for review of that doctrine.

Mrs. Shelton argues that the equitable mootness doctrine was abused in the instant case to avoid appellate review on the merits of the order confirming the plan of reorganization. As a matter of the procedural history of this case, this is simply untrue. The Fifth Circuit refused to consider a motion to dismiss the Shelton appeal and deferred its ruling on the motion to the merits. The court required the parties to fully brief all the issues on the merits of the appeal and initially set the matter for oral argument. Only after reviewing the record excerpts and the briefs on the merits did the Fifth Circuit decide that oral argument was unnecessary and that the case could be decided on the briefs. The opinion handed down by the Fifth Circuit rests upon the equitable mootness

doctrine as its ground for decision, but the fact remains that Mrs. Shelton received the benefit of a full appellate review of the merits of her case.

With regard to the merits of the appeal, Mrs. Shelton also contends that, if given an opportunity, she could establish that Rosbottom received assets under the plan of a value far in excess of the value of his legitimate claims and those of other creditors which he agreed to pay under his plan. Mrs. Shelton had an adequate opportunity to offer proof on these "valuation" issues at the confirmation hearing which was held on October 10, 1996. For reasons know only to her and her counsel, she chose not to offer any evidence at the hearing. Rosbottom presented the testimony of a certified public accountant on the valuation issue. The trustee also made available for questioning by the bankruptcy court his certified public account who had been retained with court approval to represent the estate. The court's decision on the issue of valuation was made based upon this uncontested evidence. Mrs. Shelton offered no contrary evidence. The matter of the Debtor's valuation is therefore concluded. Mrs. Shelton had her opportunity and waived it.

Mrs. Shelton also argues that she had no opportunity prior to substantial consummation of the plan to seek a stay of the order of confirmation pending appeal. This is patently untrue. The confirmation order was entered on October 10, 1996, and the first transfers required for consummation of the plan did not take place until November 4, 1996. Mrs. Shelton had 25 days to seek stay orders from both the bankruptcy court and the district court. For reasons known only to her and her counsel, she did not attempt to do so. She has therefore waived any objection to consummation of the plan prior to completion of her appeal.

Mrs. Shelton also argues that the plan in the instant case was a liquidating plan, rather than a reorganization plan. Rosbottom does not agree with this characterization of the plan. The Shelton business was reorganized in a new entity with a new equity security holder, but the business was otherwise continued. New capital was infused, existing creditors were paid and new creditors have been created in the ongoing business of the reorganization entity. To unscramble all these continuing transactions now would be virtually impossible. The Rosbottom plan provided, among other things, for the compromise of five adversary proceedings of dubious merit which the Debtor had filed against Rosbottom and the transfer to the reorganization entity (SFI) of all of the Debtor's assets; in exchange for which Rosbottom's infused $250,000 cash and $112,500 of real estate (a total of $362,500) into SFI, which assumed some $1,097,525 of secured debt owed to Rosbottom, $521,735 of secured debt to the Small Business Administration and the Bank of Saint Francisville, $120,000 of priority tax debt, $66,000 of administrative expenses of the Chapter 11 proceeding, $10,000 of debt to Mrs. Shelton's sister, and $502,740 of unsecured trade debt (for total assumed debt of $2,318,000). A substantial portion of this assumed debt has now been paid and new debts have been incurred by the reorganization entity in connection with its ongoing operations. These transactions represent a very real change in circumstances and, contrary to Mrs. Shelton's' contentions, they cannot now be undone.

Mrs. Shelton also argues that relief could be granted to her without affecting the rights of innocent third parties who are not before the court. We fail to see how this could take place at this late date. If the plan is unwound, would not SFI be entitled to reimbursement from innocent third parties, including the Small Business Administration and the IRS, of

the sums it has paid to them? As noted above, secured creditors, administrative expense claimants, the taxing authorities and unsecured creditors who are not before the court have been paid under the plan. In effect, Mrs. Shelton seeks a one-sided, partial dismantling of the plan. She desires to leave the plan intact insofar as it benefitted her by payment of her corporation's debts. She seeks to dismantle the plan only insofar as it transferred to Rosbottom her corporation's assets. Unfortunately for Mrs. Shelton, the assets and liabilities of a business do not exist independently of one another. They exist side by side on the balance sheet. If Rosbottom were required to give up the assets he acquired under the plan, he would be entitled to recover from innocent third parties the debts of the business which he has paid. The parties cannot be returned to the *status quo ante* without affecting the rights of innocent third parties.

CONCLUSION

The facts and procedural history of the instant case do not make it a good one for consideration by this Court of the "equitable mootness" doctrine developed by the circuit courts of appeal. Accordingly, the petition for writs of certiorari should be denied.

Respectfully submitted,

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